

Jack Thompson Oldsmobile, Inc. and American Federation of Professional Salesmen. Case 13-CA-19175

May 16, 1983

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On May 15, 1981, the Board issued its Decision and Order in this proceeding,¹ in which it adopted, *inter alia*, the Administrative Law Judge's finding that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by unilaterally instituting a policy of withholding one-half of a salesman's commission for failing to follow the Respondent's rule requiring them to turn over a customer to the finance and insurance department manager, and violated Section 8(a)(3) and (1) of the Act by constructively discharging employee Robert Manhattan by giving him the choice of accepting the policy change or quitting.

Upon a petition for review and cross-application for enforcement of the Board's Order, the United States Court of Appeals for the Seventh Circuit, on July 7, 1982, refused enforcement of the Board's Order with respect to the foregoing findings and remanded the case to the Board for further proceedings consistent with its opinion.² The court questioned the Board's conclusion that the commission penalty system constituted a change in the salesmen's wage structure and it remanded the case to the Board to determine whether the observance of the turnover rule was a contractual precondition to the receipt of a commission. In remanding with respect to Manhattan's constructive discharge, the court asserted that its determination was dependent on the resolution of the unilateral change of policy issue. Thereafter, pursuant to the Board's direction the Respondent filed a statement of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the foregoing, the Board has accepted the court's finding and conclusions as the law of the case and has now concluded that the Respondent's unilateral institution of a policy to withhold part of a salesman's commission when he failed to turn over a customer was not unlawful. The Respondent consequently did not constructively dis-

charge Manhattan by insisting on compliance with the new policy.

The Respondent's salesmen received a monthly salary plus a commission for sales work. Article XIV, section 6, of the collective-bargaining agreement between the Respondent and the Union stated that "A commission shall not be earned until all stipulated monies are paid and delivered to the dealership or approved by the finance company and the salesman has delivered all necessary documents required to complete the transaction of the dealer." Also, the "Salesman's Policy Manual" contained the following about commissions:

Salesmen are required to turn all customers over to the "Business Manager" (F & I Department). An application for mechanical breakdown insurance or a customer signed waiver declining such coverage must accompany every deal or transaction cannot be completed. The application or waiver are considered necessary documents to the transaction.

On September 1, 1979,³ the Respondent, without notifying or offering to bargain with the Union, added an enforcement provision to this turnover policy which penalized salesmen one-half of their commission on each sale on which they failed to turn the customer over to the finance and insurance department manager. On September 5, salesman Manhattan failed to turn over to the manager a customer who had purchased a truck. Subsequently, on September 8, the Respondent withheld one-half of the commission Manhattan earned on the sale. When Manhattan protested to General Manager Thompson that the withholding was unlawful and in violation of the union contract, Thompson replied that he did not care about the Union and that if Manhattan did not like it he could "get the hell out." Manhattan left the office but returned later and asked Thompson if that was the way Thompson really wanted it. Thompson said yes.

The reasoning implicit in the Board's original Decision and Order was that, even if the turnover rule constituted an existing precondition to the receipt of a commission, the Respondent's unilateral establishment of a withholding system constituted a departure from past practice and a new wage penalty about which the Respondent was obliged to bargain.⁴

³ All dates hereafter refer to 1979.

⁴ Compare *Capital Times Co.*, 223 NLRB 651 (1976), where the Board held that the respondent had no duty to bargain about its code of ethics, but violated Sec. 8(a)(5) by failing to bargain prior to implementing a penalty clause to enforce the code.

Continued

¹ 256 NLRB 24.

² *Jack Thompson Oldsmobile, v. NLRB*, 684 F.2d 458. The court granted enforcement of the Board's Order as to the Respondent's unlawful unilateral delegation of the responsibility for financing and insurance transactions to an outside firm on November 7, 1979.

The court of appeals, however, indicated that collective-bargaining about the turnover rule could have sufficed to permit unilateral withholding.

Specifically, the court stated:

In summarily concluding that the employer's new method of enforcing the turnover rule was a change in the commission structure, the Board's analysis fails to consider that the turnover procedure may well have been a valid precondition to the receipt of a commission. If that is true, then we would have great difficulty in viewing the turnover-enforcement rule as a "change" in the established wage structure.⁵

The court further stated:

Even if it is true that the employer is not entitled under the collective bargaining agreement to enforce ordinary company work rules by means of a monetary sanction, that does not mean that the employer is required to pay a full commission to a salesperson who has failed to perform one of the contractual preconditions to a commission. The question of the employer's power to enforce work rules by means of a monetary sanction is quite distinct from the question of the employer's right to withhold part of a commission for failure to earn a full commission.⁶

Accepting the court's analysis as the law of this case, it is apparent from the above-quoted provisions of the collective-bargaining agreement and the "Salesman's Policy Manual" that a customer's application for insurance or his signed waiver declining such insurance is one of the "necessary documents" a salesman must deliver upon the completion of a sale in order to receive a commission. We therefore conclude that the turnover of the customer to the finance and insurance manager was a precondition to the receipt of a sales commission. Consequently, we find that, under the collective-bargaining agreement and the "Salesman's Policy Manual," the Respondent had the authority to enforce its turnover rule by withholding one-half of a salesman's commission when he failed to turn over a customer.⁷ Accordingly, we dismiss the complaint allegation that the Respondent violated Sec-

tion 8(a)(5) and (1) of the Act by unilaterally instituting a commission penalty system.

Having found that the Respondent's policy of withholding one-half of a salesman's commission when he did not turn over a customer was not unlawful, we find that the policy was not so intolerable that it forced Manhattan to resign rather than accept the policy change. Accordingly, we dismiss the complaint's allegation that the Respondent violated Section 8(a)(3) and (1) by constructively discharging Manhattan.⁸

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby affirms the original Decision and Order in this proceeding (256 NLRB 24), as modified below, and orders that the Respondent, Jack Thompson Oldsmobile, Inc., Oak Lawn, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Board's original Decision and Order, as so modified:

1. Delete paragraph 1(b), relettering the subsequent paragraphs accordingly.
2. Substitute the following for paragraph 2(a) and delete paragraph 2(b), relettering the subsequent paragraphs accordingly:

"(a) Restore the method of computing salesmen's commissions to that which existed prior to the unilateral changes instituted on November 7, 1979, and, if the Respondent still desires such changes, bargain in good faith with the Union concerning them."

3. Substitute the attached notice for the original.

⁸ The Respondent has requested oral argument. This request is hereby denied as the record and the statement of position adequately present the issues and the positions of the parties.

APPENDIX

NOTICE TO EMPLOYEES POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER of the National Labor Relations Board

After a hearing at which all parties had the opportunity to present their evidence, it has been decided that we violated the law, and we have been ordered to post this notice. We intend to carry out the Order of the Board and abide by the following:

WE WILL NOT unilaterally change a method of computing our salesmen's commissions without notice to or bargaining with the American Federation of Professional Salesmen.

Member Hunter notes that the Board's original Decision and Order in this proceeding and its Decision in *Capital Times Co.*, above issued prior to his appointment to the Board. In view of the acceptance of the court's analysis in the instant proceeding as the law of the case, Member Hunter finds it unnecessary to pass on the Board's holdings in its original Decision in this case or in *Capital Times Co.*

⁵ 684 F.2d at 462.

⁶ *Id.* at 463, fn. 6.

⁷ We agree with the court that the record affords an insufficient basis for finding that the withholding procedure constituted an excessive "penalty" under traditional contract principles.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

WE WILL make whole the employees in the appropriate unit for the loss of pay, if any, they may have suffered by reason of the unilateral changes in their terms and conditions of employment, with interest.

WE WILL restore the method of computing our salesmen's commissions to that which existed prior to the unilateral changes instituted on November 7, 1979, and WE WILL, upon request, bargain collectively in good faith with the certified representative of our employees in the appropriate collective-bargaining unit concerning any changes in wages, hours, working conditions, and other terms and conditions of said employees. The collective-bargaining unit is:

All new and used car salesmen, excluding office and plant clericals, automobile mechanics, semiskilled help, parts department employees, professional employees, guards and supervisors as defined in the Act.

JACK THOMPSON OLDSMOBILE, INC.